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## Wills and Trusts

Gerry W. Beyer

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# WILLS AND TRUSTS

Gerry W. Beyer\*

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THIS Article discusses legislative and judicial developments relating to Texas law on intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of October 1, 2006 through September 30, 2007. Not all newly enacted statutes and decided cases during the Survey period are presented, and not all aspects of each cited statute and case are analyzed. You must read and study the full text of each statute and case before relying on it or using it as precedent. The discussion of most cases includes a moral that is the important lesson to be learned from the case. By recognizing situations that have resulted in time consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

## I. INTESTACY

### A. DISQUALIFICATION OF "BAD" PARENT

Under certain circumstances, a "bad" parent will not be able to inherit from his or her minor child—or in some cases, from any minor child—under new Texas Probate Code section 41(e)-(f).<sup>1</sup> Four conditions must be satisfied before the disinheritance occurs by constructively treating the parent as predeceasing the child. First, even if all of the conditions of disinheritance are met, the disinheritance is not automatic; it must be declared by the court.<sup>2</sup> Second, if the child lives until age eighteen, disin-

1. See Act of May 27, 2007, 80th Leg., R.S., ch. 1412, § 2, 2007 Tex. Gen. Laws 4855, 4856 (current version at TEX. PROB. CODE ANN. § 41(e)-(f) (Vernon Supp. 2008)) (applying only to an intestate who dies on or after September 1, 2007).

2. See TEX. PROB. CODE ANN. § 41(e) (Vernon Supp. 2008).

heritance does not occur regardless of the parent's bad acts.<sup>3</sup> The reason underlying this condition is that once the child reaches age eighteen, the child may write a will. Third, the parent must have committed an "evil act" described in the statute, such as (a) voluntarily abandoning and failing to support the child in accordance with the parent's obligation or ability for at least three years before the child's death while having failed to resume support by time of the child's death; (b) voluntarily and with knowledge of the pregnancy, abandoning the mother before birth of the child, failing to provide adequate support or medical care for the mother during the period of abandonment, and remaining apart from and failing to support the child since birth; or (c) being criminally responsible for death or serious injury to "a" child according to a laundry list of penal statutes.<sup>4</sup> Fourth, the "evil acts" must be proved by clear and convincing evidence.<sup>5</sup>

Although these amendments are based on the sound public policy of preventing a wicked person from benefiting from his or her evil deeds, they raise many problems. First, it is arguable that the portion of the new provision causing disinheritance for certain convictions is unconstitutional because article I, section 21 of the Texas Constitution provides that "[n]o conviction shall work . . . forfeiture of estate."<sup>6</sup> Texas does not have a slayer statute applicable to an intestate heir or will beneficiary who murders the decedent to accelerate receiving the property. Instead, Texas courts prevent unjust enrichment by imposing a constructive trust so that title to the ill-gotten property actually passes to the murderer, who then holds the property as a constructive trustee for the individuals who are rightfully entitled to it.<sup>7</sup> On May 30, 2008, the Texas Attorney General issued a ruling indicating that Texas courts would likely find that section 41(e)(3) is unconstitutional.<sup>8</sup>

Second, the new provisions may be too narrow in scope because disqualification occurs only if the bad acts are done by a parent. Thus, if another heir such as a grandparent or sibling engages in the evil acts, the heir may still be able to inherit.

Third, the amendments may be too broad. Texas Probate Code section 41(e)(3) references "a child," not "the child" like section 41(e)(1)-(2).<sup>9</sup> Accordingly, a person could be precluded from inheriting from a child for conduct that did not involve the intestate child.

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3. See *id.*

4. See *id.* § 41(e)(1)-(3).

5. *Id.* § 41(e).

6. See TEX. CONST. art. I, § 21.

7. See *Pritchett v. Henry*, 287 S.W.2d 546, 550-51 (Tex. Civ. App.—Beaumont 1955, writ *dism'd w.o.j.*).

8. Tex. Atty. Gen. Op. No. GA-0632 (2008).

9. Compare TEX. PROB. CODE ANN. § 41(e)(3) (Vernon Supp. 2008), with TEX. PROB. CODE ANN. § 41(e)(1)-(2) (Vernon Supp. 2008).

## B. ECONOMIC CONTRIBUTION

In attempting to show economic contribution when computing intestate shares, *Rogers v. Foxworth*<sup>10</sup> serves as an important reminder to present evidence of the increase in value due to the contribution. After their father's death, Rogers' daughters claimed economic contribution from their step-mother for the contributions their father made to her separate property—which included a house and a teacher-retirement account based on Texas Family Code section 3.403. These contributions would enhance the daughters' intestate share because they are entitled to all of their father's one-half interest in the community property under Texas Probate Code section 45.

The appellate court denied the daughters' claim against the house because they failed to show that the house increased in value as a result of the economic contributions.<sup>11</sup> Although the daughters were able to show that community property was used to reduce the balance owed on their step-mother's house, the evidence needed to show that the increased net equity in the step-mother's house was due to the expenditure of community funds.<sup>12</sup>

## II. WILLS

### A. NUNCUPATIVE WILLS

As of September 1, 2007, Texans may no longer make nuncupative (oral) wills of personal property under the very limited circumstances previously allowed by sections 64-65 of the Texas Probate Code.<sup>13</sup>

### B. DIVORCE

Prior to the 2007 amendments to Probate Code section 69, only will provisions in favor of the ex-spouse were read as if the ex-spouse predeceased the testator.<sup>14</sup> This gave rise to two problems.

#### 1. *Gifts conditioned on survival*

Assume that Harry's will contained the following provision: "I leave \$100,000 to Wanda, my wife. If she does not survive me, I leave this \$100,000 to Sammy, my son. I leave the remainder of my estate to the American Red Cross." Harry and Wanda then divorced, and Harry died without changing his will.

The gift to Wanda is read as if she predeceased Harry so she does not receive the legacy. However, the condition on Sammy's gift that Wanda

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10. 214 S.W.3d 196 (Tex. App.—Tyler 2007, no pet.).

11. *Id.* at 199.

12. *Id.* at 198-99.

13. Act of Mar. 17, 1955, 54th Leg., R.S., ch. 55, §§ 64-65, 1955 Tex. Gen. Laws 88, 109, repealed by Act of May 15, 2007, 80th Leg., R.S., ch. 1170, § 5.05, 2007 Tex. Gen. Laws 4000, 4005.

14. See *In re Estate of Nash*, 220 S.W.3d 914, 917-18 (Tex. 2007).

not survive Harry is not satisfied. Thus, Sammy would not receive the legacy, which would instead pass to the American Red Cross.

Section 69 solves this problem by providing that “all provisions in the will . . . shall be read as if the former spouse . . . failed to survive the testator.”<sup>15</sup> Therefore, Sammy now receives the legacy.

## 2. *Gifts to other ex-relatives*

Assume that Harry’s will contained the following provision: “I leave \$100,000 to Wanda, my wife. I leave another \$100,000 to her son, my step-son, Sammy. I leave the remainder of my estate to the American Red Cross.”

Although Wanda’s gift would not have been effective under prior law, Sammy would still have received his legacy. Section 69 now addresses this problem by providing that the will is “read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator.”<sup>16</sup> Accordingly, other ex-relatives (step-children, parents-in-law, etc.) will not continue to be beneficiaries after a divorce.

## C. AMBIGUITY

The importance of careful drafting to describe specific gifts is demonstrated by *In re Estate of Bean*,<sup>17</sup> a case in which the testatrix’s will devised “the eighty (80) acres I own in the J. Bennett Survey” to the devisee. When the testatrix died, she owned two interests potentially covered by this devise: a surface estate of 77.83 acres and an undivided mineral estate of 85.1 acres. Both of these interests were only partly contained within the Bennett Survey. A dispute arose regarding whether these interests passed to the devisee or to the remainder beneficiaries.

In a lengthy and highly procedurally grounded opinion, the Texarkana Court of Appeals determined that the devise unambiguously covered only the mineral estate because later language in the devise referred to a gas well, rather than a surface interest.<sup>18</sup> Because the court determined the devise was unambiguous, extrinsic evidence could not be used to ascertain the testatrix’s intent.<sup>19</sup> Accordingly, the devisee received the mineral estate, and the surface estate passed to the remainder beneficiaries.<sup>20</sup>

The court’s conclusion that the devisee was open to only one construction is problematic. The court easily could have determined that the language referring to the gas well was not an attempt by the testatrix to limit the conveyance to the mineral estate. Significantly, the number of acres

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15. See TEX. PROB. CODE ANN. § 69(b) (Vernon Supp. 2008).

16. See *id.*

17. 206 S.W.3d 749 (Tex. App.—Texarkana 2006, pet. denied).

18. *Id.* at 762-63.

19. *Id.*

20. *Id.*

mentioned in the devise (80) is closer to the true size of the surface interest (77.83) than the mineral estate (85.1).

#### D. VOID GIFTS

*Jones v. Krown*<sup>21</sup> demonstrates a significant problem that may arise if an attorney prepares a will for a staff member's relative. In *Krown*, an attorney drafted a will that named his paralegal (an independent contractor) as both a beneficiary and the executrix. After the testator died, his sister filed a motion for a declaratory judgment to set aside the gift to the paralegal under Texas Probate Code section 58b, which, at the time the will was drafted, stated that a testamentary gift to an "employee of the attorney who prepares or supervises the preparation of the will is void."<sup>22</sup> Both the trial and appellate courts agreed that the paralegal's gift was void and that the property passed via intestacy to his sister.<sup>23</sup>

The Fort Worth Court of Appeals was unimpressed with the paralegal's arguments that section 58b did not apply to her. That the paralegal was not involved with the drafting of the testator's will and that she was not present when the testator executed the will were irrelevant.<sup>24</sup> Additionally, her technical status as an independent contractor did not keep her from falling within the purview of the term "employee," as used in the statute.<sup>25</sup> Because section 58b does not define the term, the court relied on the "plain and common meaning" of the word, defining it as an individual who works for someone else and receives payment for that work.<sup>26</sup> And because the paralegal worked for the attorney and was paid for her work, she qualified as an employee.<sup>27</sup> The court also explained that the application of section 58b to void the paralegal's gift "is consistent with the legislature's intent . . . which was to avoid having an interested person use his position of trust to benefit himself."<sup>28</sup>

Accordingly, an attorney should not draft a will which leaves property to one of his employees unless one of the exceptions in section 58b applies. Even then, prudent practice may be to refer the employee to a completely disinterested attorney.

### III. ESTATE ADMINISTRATION

#### A. NOTICE OF PROBATED WILL

The 2007 legislature made enormous changes to Texas Probate Code section 128A regarding the responsibility of the personal representative

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21. 218 S.W.3d 746 (Tex. App.—Fort Worth 2007, pet. denied).

22. *Id.* at 747 (quoting Act of May 30, 1997, 75th Leg., R.S., ch. 1054, § 1, 1997 Tex. Gen. Laws 4016, 4016 (amended 2005) (current version at TEX. PROB. CODE ANN. § 58b (Vernon Supp. 2008))).

23. *Id.* at 750.

24. *Id.* at 748-50.

25. *Id.* at 749.

26. *Jones*, 218 S.W.3d at 749.

27. *Id.*

28. *Id.*

(both dependent and independent) to give notice to the beneficiaries once the court has admitted the will to probate. Prior to this change, only charitable beneficiaries were entitled to notice.<sup>29</sup> Now, virtually all beneficiaries are entitled to notice if the testator died on or after September 1, 2007.<sup>30</sup>

### 1. *Basic compliance rules*

The personal representative must give any required notice no later than the sixtieth day after the date of an order admitting the will to probate.<sup>31</sup> If the personal representative becomes aware of the identity and address of a beneficiary after the sixty-day period, the personal representative must give notice to that beneficiary as soon as possible.<sup>32</sup>

Unless an exception applies, the personal representative must give notice to the following recipients of property named in the testator's will: a person, an entity, the state, a governmental agency of the state, a charitable organization, and a trust.<sup>33</sup> If the beneficiary is alive on the date of the decedent's death, it will be assumed for purposes of giving notice that the person will outlive any survival period stated in the will.<sup>34</sup> Thus, the personal representative does not need to give notice to contingent or alternative beneficiaries who would take if the beneficiary fails to survive.<sup>35</sup>

The personal representative must give notice to each beneficiary whose identity and address the personal representative knows or could ascertain through reasonable diligence.<sup>36</sup> For trust beneficiaries, the personal representative normally satisfies this duty by giving notice to the trustee.<sup>37</sup> However, if the personal representative is also the trustee, the personal representative must give notice to the beneficiaries of the trust who would be first eligible to receive the trust income if the trust were in existence (funded) on the date of the testator's death.<sup>38</sup> If the beneficiary has a court-appointed guardian or conservator, the personal representative must give notice to that guardian or conservator.<sup>39</sup> Similarly, if the beneficiary is a minor who does not have a court appointed guardian or conservator, the personal representative must give notice to at least one of the minor's parents.<sup>40</sup> Prudent practice may be to give notice to both parents even though it is not required. If the beneficiary is a charity that

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29. See Act of May 23, 1989, 71st Leg., R.S., ch. 1035, § 7, 1989 Tex. Gen. Laws 4162, 4166 (amended 2007) (current version at TEX. PROB. CODE ANN. § 128A (Vernon Supp. 2008)).

30. Act of May 28, 2007, 80th Leg., R.S., ch. 801, § 1, sec. 128A, 2007 Tex. Gen. Laws 1657, 1658-59 (current version at TEX. PROB. CODE ANN. § 128A (Vernon Supp. 2008)).

31. TEX. PROB. CODE ANN. § 128A(b) (Vernon Supp. 2008).

32. *Id.*

33. *Id.* § 128A(a)-(b).

34. *Id.* § 128A(a).

35. See *id.*

36. *Id.* § 128A(b).

37. *Id.* § 128A(c)(1).

38. *Id.*

39. *Id.* § 128A(c)(2).

40. *Id.* § 128A(c)(3).



cannot be directly notified, the personal representative must give notice to the attorney general.<sup>41</sup>

Certain beneficiaries are exempt from the notice requirement. A beneficiary who appeared in the testator's estate proceeding before the will was admitted to probate does not need notice because the beneficiary obviously already knows about the probate proceeding.<sup>42</sup> Similarly, a beneficiary who has already received a copy of the probated will does not need notice if the beneficiary has "waived the right to receive notice in an instrument that (1) acknowledges receipt of the copy of the testator's will, (2) is signed by the beneficiary, and (3) is filed with the court."<sup>43</sup> Note that the beneficiary's copy of the will need not be a certified copy, and the beneficiary does not need to receive a copy of the order admitting the will to probate.<sup>44</sup> In addition, the waiver does not need to be acknowledged; thus, the waiver does not need to be notarized.<sup>45</sup>

The notice must contain the following: (1) the name and address of the beneficiary and—if applicable—the name and address of the person to whom the personal representative is giving notice, (2) the testator's name, (3) a statement that the testator's will has been admitted to probate, (4) a statement that the beneficiary is named as a beneficiary in the will, (5) the personal representative's name and contact information, (6) a copy of the will admitted to probate, and (7) a copy of the order admitting the will to probate.<sup>46</sup>

The personal representative must send the notice by registered or certified mail, return receipt requested.<sup>47</sup> No other method (e.g., hand delivery, Federal Express, or fax) is allowed.<sup>48</sup>

The personal representative must prove compliance by filing a sworn affidavit with the clerk of the court in which the testator's estate is pending no later than the ninetieth day after the date of order admitting a will to probate.<sup>49</sup> Alternatively, the personal representative's attorney may file a signed certificate.<sup>50</sup> The affidavit or certificate may be included with any other pleading or document filed with the court clerk, such as the inventory, appraisal, or list of claims.<sup>51</sup> Any such "coupled" filing must still comply with the timing requirement for the proof of notice.<sup>52</sup>

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41. *Id.* § 128A(c)(4).

42. *See id.* § 128A(d)(1).

43. *Id.* § 128A(d)(2).

44. *See id.*

45. *See id.*

46. *Id.* § 128A(e).

47. *Id.* § 128A(f).

48. *See id.*

49. *Id.* § 128A(g).

50. *Id.*

51. *Id.* § 128A(h).

52. *Id.*

## 2. Potential Problems

The new notice duties will increase the time and monetary costs for many probates in Texas. Ostensibly, the reasoning is that this increased cost and inconvenience will help protect beneficiaries from unscrupulous personal representatives who probate wills and then use estate funds for their own unauthorized purposes.

These new duties create problems for wills that designate beneficiaries by class, such as “my children” or “my grandchildren.” The new law requires the personal representative to give notice to “each beneficiary named in the will.”<sup>53</sup> Thus, whether class gift members are “named” so that they are entitled to notice is uncertain. Later in the same provision, however, the personal representative is required to ascertain the “identity” of the beneficiaries.<sup>54</sup> One could argue that the personal representative must use reasonable diligence to ascertain the membership of class gifts and provide them notice. Despite the ambiguity in the statute, the prudent practice is to give notice to ascertainable class gift members.

While the personal representative must use “reasonable diligence” to ascertain the identity and address of each beneficiary, the statute lacks guidance regarding what actions constitute reasonable diligence.<sup>55</sup> The personal representative should probably ask other beneficiaries, look in the telephone book, and use an Internet search engine to ascertain the beneficiaries. Whether the personal representative needs to take further actions, such as hiring a private investigator, remains uncertain.

The personal representative must give notice to beneficiaries even if they are only receiving nominal gifts. Thus, the cost of giving notice could be greater than the value of a gift.

If the personal representative is also a beneficiary, as is often the case, the personal representative must either give him-/herself notice or file a waiver.<sup>56</sup> Although this seems ridiculous, the statute contains no exception for gifts to the personal representative.<sup>57</sup>

A court-appointed personal representative also has a duty to give notice. When a will is probated as a muniment of title, the court does not appoint a personal representative.<sup>58</sup> Accordingly, the notice duties do not apply when a will is probated as a muniment of title.

### B. LOST WILLS

Controversy exists regarding whether a copy of a lost will is sufficient to prove its contents. Until amended by the 2007 legislature, the statute provided that the contents must be proved “by the testimony of a credi-

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53. *Id.* § 128A(b).

54. *Id.*

55. *Id.*

56. *See id.* § 128A.

57. *See id.*

58. *In re Estate of Kurtz*, 54 S.W.3d 353, 355 (Tex. App.—Waco 2001, no pet.).

ble witness who has read [the original] or heard it read.”<sup>59</sup> Several recent cases focused on this issue and reached differing results.<sup>60</sup>

The addition of a supposed third method of proof to Texas Probate Code section 85 by the 2007 legislature, namely proof by identification of a copy, does not appear to actually add a new method because of the difficulty of a person testifying that the document is “a copy of the will” if the person never read the original or heard the original read.<sup>61</sup>

### C. QUALIFIED COMMUNITY ADMINISTRATION ABOLISHED

The qualified community administration procedure under Texas Probate Code sections 161-167 and 169-175 was used when someone besides the surviving spouse had an interest in the community property (for example, when the deceased spouse has descendants who are not also the descendants of the surviving spouse).<sup>62</sup> The procedure was available if the will named no executor, the named executor failed to serve, or the decedent died intestate.<sup>63</sup> The surviving spouse obtained powers akin to those of an independent executor but only with respect to community property.<sup>64</sup> In many ways, the procedure was a “mini” independent administration because the surviving spouse had to formally qualify, complete an inventory, appraisal, and list of claims, *et cetera*.

The 2007 legislature completely abolished this procedure.<sup>65</sup> The underlying reason appears to be that the procedure was not frequently used, and thus, there was no reason to retain it.

### D. SALE OF REAL PROPERTY IN DEPENDENT ADMINISTRATION

The 2007 legislature simplified the process of selling real property in a dependent administration.<sup>66</sup> This new procedure operates as follows.

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59. Act of Mar. 16, 1955, 54th Leg., R.S., ch. 55, § 85, 1955 Tex. Gen. Laws 88, 116-17 (amended 2007) (current version at TEX. PROB. CODE ANN. § 85 (Vernon Supp. 2008)).

60. *Compare* Garton v. Rockett, 190 S.W.3d 139, 145-47 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding copy insufficient), *with In re Estate of Jones*, 197 S.W.3d 894, 902-03 (Tex. App.—Beaumont 2006, pet. denied) (holding copy sufficient); *see generally* Charles M. Davis, *A Lost Will, a Photocopy of the Original, and Two “Snakes in the Grass”: Is It Time to Update Section 85 of the Texas Probate Code?*, 40 TEX. TECH. L. REV. 89 (2007) (discussing the problems with lost wills).

61. *See* TEX. PROB. CODE ANN. § 85 (Vernon Supp. 2008).

62. *See* Act of May 5, 1971, 62d Leg., R.S., ch. 173, §§ 11-13, 1971 Tex. Gen. Laws 967, 980-983, *repealed by* Act of May 15, 2007, 80th Leg., R.S., ch. 301, § 7, 2007 Tex. Gen. Laws 575, 577.

63. *See* Act of May 5, 1971, 62a Leg., R.S., ch. 173, § 11, 1971 Tex. Gen. Laws 967, 980-82 (*repealed* 2007).

64. *See* Act of May 5, 1971, 62a Leg., R.S., ch. 173, § 13, 1971 Tex. Gen. Laws 967, 982-83 (*repealed* 2007).

65. *See* Act of May 15, 2007, 80th Leg., R.S., ch. 301, § 7, 2007 Tex. Gen. Laws 575, 577.

66. Probate Code section 343 (setting of hearing on application) was repealed, Probate Code section 345A was added, and conforming amendments were made to Probate Code sections 344 (citation and return on application), 345 (opposition to application), and 346 (order of sale). Act of May 15 2007, 80th Leg., R.S., ch. 1170, §§ 9.01-.05, 2007 Tex. Gen. Laws 4000, 4008.

The citation that is issued after the personal representative applies to sell real property must inform the recipients of their right to file an opposition to the sale during a period of time set by the court.<sup>67</sup> If an opposition is not filed in a timely manner, then a hearing on the application to sell real property is not required; however, the court has discretion to require a hearing even if an opposition was not filed.<sup>68</sup> If an interested person files a timely opposition to the application to sell real property, the clerk must immediately notify the judge about the opposition.<sup>69</sup> The court is then required to hold a hearing on the application.<sup>70</sup>

If the court orders a hearing, it must designate in writing a date and time to hear the application and the opposition, if any.<sup>71</sup> The clerk must issue a notice that provides the date and time of the hearing to the applicant and to each person who filed an opposition to the sale.<sup>72</sup>

#### E. BUSINESS OPERATION IN DEPENDENT ADMINISTRATION

Texas Probate Code section 238 has been substantially modernized to make it easier for a dependent personal representative to run the decedent's business, farm, ranch, or factory without the necessity of obtaining court permission for every action.<sup>73</sup> Under section 238, the court may grant the dependent personal representative the powers to operate the decedent's business only if: (1) all interested persons receive notice, (2) the court conducts a hearing, (3) the business was not specifically gifted in the decedent's will, (4) it is not necessary to sell the business to pay debts or for other lawful purposes, and (5) the court determines that it is in the best interest of the estate for the personal representative to operate the business.<sup>74</sup> Before granting any powers, the court must consider (1) the condition of the estate and the business, (2) the necessity that may exist in the future to sell the business or its assets to pay debts, claims, or other lawful estate expenditures, (3) the effect of the order on the speedy settlement of the estate, and (4) the best interests of the estate.<sup>75</sup>

If the court allows the personal representative to operate the business, the personal representative will receive the powers that a dependent personal representative may traditionally exercise without court order under Texas Probate Code section 234(b) unless the court specifically limits those powers.<sup>76</sup> The personal representative also receives whichever of the following powers the court specifically grants: (1) "the power to hire,

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67. TEX. PROB. CODE ANN. § 344 (Vernon Supp. 2008).

68. *Id.* § 345A(b) (Vernon Supp. 2008).

69. *Id.* § 345A(a).

70. *Id.*

71. *Id.* § 345A(c).

72. *Id.* "The judge may, by entries on the docket, continue a hearing . . . from time to time until the judge is satisfied concerning the application." *Id.* § 345A(d).

73. See Act of May 23, 2007, 80th Leg., R.S., ch. 668, § 1, sec. 238, 2007 Tex. Gen. Laws 1244, 1244-46 (current version at TEX. PROB. CODE ANN. § 238 (Vernon Supp. 2008)).

74. TEX. PROB. CODE ANN. § 238(b) (Vernon Supp. 2008).

75. *Id.* § 238(f).

76. *Id.* § 238(c).

pay, and terminate" the business's employees; (2) "the power to incur debt on behalf of the business" and to secure that debt by liens against business assets or the estate; (3) the power to purchase and sell property in the ordinary course of the business's operation, including purchasing and selling real property if the court finds that the business's principal purpose is the purchase and sale of real property; (4) the power to enter into leases or contracts—including those that may extend beyond the settlement of the estate if doing so appears consistent with the speedy settlement of the estate; and (5) any other power the court finds necessary to operate the business.<sup>77</sup> If the order grants the personal representative the power to purchase, sell, lease, or otherwise encumber real or personal property, the order governs such action and the personal representative does not need to comply with other Texas Probate Code provisions regarding the purchase, sale, lease, or encumbrance of estate property, including provisions requiring citation or notice.<sup>78</sup>

A personal representative who obtains an order to operate the decedent's business has all of the same fiduciary duties as a personal representative who does not operate a business that is part of the estate.<sup>79</sup> In operating the business, the personal representative must consider: (1) "the condition of the estate and the business;" (2) "the necessity that may exist in the future to sell the business or its assets to pay debts, claims, or other lawful estate expenditures;" (3) the effect of the order on the speedy settlement of the estate;" and (4) "the best interests of the estate."<sup>80</sup> In addition, the personal representative must: (1) report to the court the condition and operation of the business as part of the normal annual and final accountings unless the court orders more frequent reports or a different type of report; and (2) file a notice in the real property records of the county in which the real property is located prior to purchasing, selling, leasing, or otherwise encumbering any real property of the business.<sup>81</sup>

A third party who deals in good faith with a personal representative with respect to a transaction involving a purchase, sale, lease or other encumbrance of real property of a business may rely on the notice that the personal representative must file, as well as any order entered under Texas Probate Code section 238 and filed as part of the estate records maintained by the clerk of the court in which the estate is pending.<sup>82</sup>

#### F. ACCELERATION OF CHILD SUPPORT OBLIGATION

If a person owing child support dies before the child support obligation terminates, the remaining unpaid balance of the child support obligation

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77. *Id.* § 238(d).

78. *Id.* § 238(e).

79. *Id.* § 238(g).

80. *Id.* § 238(g)(1).

81. *Id.* § 238(g)(2)-(h).

82. *Id.* § 238(i).

becomes payable on the date of the person's death.<sup>83</sup> The claim falls within "Class 4" under Texas Probate Code section 322.<sup>84</sup>

### 1. *Determination of Amount*

The family court (not the probate court) must determine the amount of the unpaid child support by applying the following factors: (1) the present value of the total amount of child support payments that would have become due between the month the decedent died and the month the child turns eighteen, (2) the present value of the total amount of health insurance premiums payable for the child's benefit from the month the decedent died until the month the child turns eighteen, (3) any enhancements of support provided by Family Code 154.306 if the decedent owed support for a disabled minor or adult child, (4) the nature and amount of any benefit to which the child may be entitled because of the decedent's death, such as life insurance proceeds, annuity payments, social security death benefits, trust distributions, and retirement survivor benefits, and (5) "any other financial resources available for the support of the child."<sup>85</sup>

If the court finds that the child support obligation has not been satisfied, the court must render a judgment in favor of the obligee, for the benefit of the child, in the amount of the unpaid child support.<sup>86</sup> This obligee may then present this claim following the usual Texas Probate Code procedures.<sup>87</sup>

### 2. *Problems*

Although public policy seemingly supports this new statute, it is nonetheless fraught with potential problems. First, this statute may result in a child who is entitled to child support receiving a better deal (that is, a windfall) when compared to a child whom the decedent was supporting but who was not receiving child support. For example, assume that Mother has two children, A and B. Child A lives with her father and Mother pays child support. Child B lives with Mother. Mother dies unmarried and intestate. The father will have a claim against Mother's estate for the present value of the future child support. After paying this claim and her other creditors, Mother's remaining property, if any, is split equally between Child A and Child B. As a result, Child B is in a comparatively worse position because of the accelerated amount of child support for Child A.

In addition, the statute lacks a provision for refunding the decedent's estate if the child dies before reaching age eighteen. Thus, the custodial parent may receive a considerable windfall upon the child's death.

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83. TEX. FAM. CODE ANN. § 154.015(b) (Vernon Supp. 2008).

84. TEX. PROB. CODE ANN. § 322 (Vernon Supp. 2008).

85. TEX. FAM. CODE ANN. § 154.015(c) (Vernon Supp. 2008).

86. *Id.* § 154.015(d).

87. *Id.* § 154.015(e).

Finally, the custodial parent receives a lump sum and may be tempted to misuse the funds. For example, the parent could spend the money immediately rather than prudently investing it for the child and allocating just enough each month to substitute for the child support payment.

#### G. WRONGFUL IMPRISONMENT CLAIMS

In *State v. Oakley*,<sup>88</sup> the Texas Supreme Court noted that Texas Civil Practice and Remedies Code section 103.154(b) expressly provides for the nonsurvival of a decedent's wrongful imprisonment claim against the state. Thus, upon the wrongfully imprisoned person's death, the unpaid amounts are credited to the state and may not be paid to the person's heirs, beneficiaries, or estate.<sup>89</sup> The court then held that because the claim did not survive, it was also unassignable during life.<sup>90</sup> Consequently, a person who is wrongfully imprisoned should collect all monies due from the state as soon as possible because any amount that is unpaid at the time of death will be forfeited.

#### H. PRO SE

In a disturbing opinion, the Waco Court of Appeals in *Steele v. McDonald*,<sup>91</sup> required all court appearances and filings by an independent personal representative to be made by a licensed attorney. In this case, the independent executor discharged his attorney and proceeded *pro se*. The court determined the independent executor was precluded from doing so because he was not a licensed attorney.<sup>92</sup> The court explained that only a licensed attorney may appear in court because the executor is litigating rights in a representative capacity.<sup>93</sup>

A well-reasoned dissent strongly disagreed.<sup>94</sup> Generally, an independent executor may do anything the decedent could have done if he were still alive.<sup>95</sup> Thus, it should follow that the executor may appear *pro se* regarding estate matters.<sup>96</sup> The judge explained that "[a]ll over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved."<sup>97</sup> If the majority's opinion is correct, all of this conduct must cease, thereby drastically reducing the effectiveness and efficiency of the independent administration system.<sup>98</sup> Should this case be left to stand, October 18, 2006, may well be remembered as the day the Texas independent administration system be-

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88. 227 S.W.3d 58, 60 (Tex. 2007).

89. *Id.* at 60 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 103.154(b) (Vernon 2005)).

90. *Id.* at 60-62.

91. 202 S.W.3d 926 (Tex. App.—Waco 2006, pet. denied).

92. *Id.* at 928.

93. *Id.*

94. *Id.* at 930-31 (Gray, C.J., dissenting).

95. *Id.* at 930.

96. *See id.* at 930-31.

97. *Id.* 930.

98. *See id.*

gan to die.<sup>99</sup>

## I. HOMESTEAD

In a certified question of first impression from a bankruptcy case pending in the United States Court of Appeals for the Fifth Circuit, the Texas Supreme Court determined, in *Norris v. Thomas*,<sup>100</sup> by a five-to-four decision, that a boat does not qualify as a homestead under article XVI, sections 50-51 of the Texas Constitution. Although the boat was used as the claimant's primary residence and otherwise satisfied the requirements of a homestead, it could not qualify for homestead protection because it was not attached to land. In the supreme court's words:

In order to qualify as a homestead, a residence must rest on the land and have a requisite degree of physical permanency, immobility, and attachment to fixed realty. A dock-based umbilical cord providing water, electricity, and phone service may help make a boat habitable, but the attachment to land is too slight to warrant homestead protection.<sup>101</sup>

Accordingly, the surviving spouse and minor children of a decedent whose primary residence is a boat will not be able to claim homestead rights such as the right to occupy the homestead until death, reaching age of majority, or abandonment. Likewise, the floating home will not be protected from the estate's general creditors.

## IV. TRUSTS

### A. TRUSTEE'S DUTY TO KEEP BENEFICIARY INFORMED

The 2007 legislature made changes to the trustee's duty to keep the beneficiaries informed of the trust and its activities. To put the changes into perspective, it is important to appreciate how this duty has been treated in the past under Texas law.

#### 1. Prior to January 1, 2006

Prior to January 1, 2006, trustees had a duty to disclose information to the beneficiaries either (1) upon request or (2) if the trustee was going to take some material and unusual action.<sup>102</sup> The existence of this duty was well accepted and did not cause significant problems for trustees.

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99. See generally Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 BAYLOR L. REV. 329, 338 (2007) (providing a detailed discussion of this case and discussing the overarching issue of proceeding *pro se* in estate administrations).

100. 215 S.W.3d 851, 852 (Tex. 2007).

101. *Id.* at 859.

102. See TEX. PROP. CODE ANN. § 113.151 (Vernon 2007) (detailing beneficiary's right to an accounting); *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) ("[Trustees have a] duty of full disclosure of all material facts . . . that might affect [a beneficiary's] rights.").



## 2. *January 1, 2006 through June 15, 2007*

The 2005 legislature codified the duty to keep the beneficiary informed when it enacted Texas Trust Code section 113.060.<sup>103</sup> This section provided that the trustee had a duty to keep the beneficiaries reasonably informed regarding (1) trust administration and (2) the material facts necessary for the beneficiaries to protect their interests.<sup>104</sup> At the same time, the legislature enacted Texas Trust Code section 111.0035(b)(5)(C) which authorized the settlor to limit this duty, but only if either (1) the beneficiary was under age twenty-five, or (2) the beneficiary was not eligible for current distribution or for a distribution if the trust were to terminate now.<sup>105</sup>

The codification of the duty to inform raised significant concerns for trustees, including (1) the meaning of the term “reasonably” and (2) whether the beneficiaries needed to be told about all trustee actions, even day-to-day activities, because notice of virtually all actions may be necessary if the beneficiaries want to protect their interests. These problems and others were triggered by the way the legislature carved section 113.060, a very short and undetailed provision, out of Uniform Trust Code section 813, which includes an extensive explanation of the duty and how it may be satisfied.<sup>106</sup>

## 3. *Starting June 15, 2007*

The 2007 legislature repealed the statutory duty in Texas Trust Code section 113.060 and restored the common law duty.<sup>107</sup> But under new Texas Trust Code section 111.0035(c), the settlor may limit the duty to keep the beneficiary informed if (1) the trust is revocable, (2) the beneficiary is under age twenty-five, or (3) the beneficiary is not eligible for current distributions or a distribution if the trust were to terminate now.<sup>108</sup>

## 4. *Recommendations*

In the words of Glenn Karisch, the time has come for the “mother of all disclosures” so that a trustee may gain maximum protection for the potential enhanced duty to disclose that existed during the seventeen and

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103. Act of May 12, 2005, 79th Leg., R.S., ch. 148, § 15, 2005 Tex. Gen. Laws 287, 292, *repealed by* Act of May 11, 2007, 80th Leg., R.S., ch. 451, § 21, 2007 Tex. Gen. Laws 801, 808.

104. *Id.*

105. Act of May 12, 2005, 79th Leg., R.S., ch. 148, § 2, 2005 Tex. Gen. Laws 287, 287-88 (amended 2007) (current version at TEX. PROP. CODE ANN. § 111.0035 (Vernon Supp. 2008)).

106. See UNIF. TRUST CODE § 813, 7C U.L.A. 609 (2006).

107. Act of May 11, 2007, 80th Leg., R.S., ch. 451, §§ 21-22, 2007 Tex. Gen. Laws 801, 808 (“The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect.”).

108. TEX. PROP. CODE ANN. § 111.0035(c) (Vernon Supp. 2008).

a half month window.<sup>109</sup> He also recommends disclosing “everything the trustee can think of to disclose, and disclose it to every beneficiary [who] can be located, regardless of remoteness.”<sup>110</sup> By doing so, the trustee will lessen the chance of being removed by the court and delaying the start of the running of statutes of limitations, which begins upon full disclosure.<sup>111</sup>

## B. SELF-DEALING WAIVERS FOR CORPORATE TRUSTEES

Under prior law, settlors and beneficiaries were prohibited from waiving or approving certain self-dealing conduct of corporate trustees such as purchasing trust property for themselves, selling their own property to the trust, and borrowing funds from the trust.<sup>112</sup> The 2007 legislature removed these restrictions, and thus, settlors and beneficiaries may now waive these duties for both individual and corporate trustees.<sup>113</sup>

## C. TERMINATION OF UNECONOMIC TRUST

Under new Texas Trust Code section 112.059, the trustee may terminate an uneconomic trust under certain conditions.<sup>114</sup> First, a trustee must give notice to (a) the current or permissible distributees of trust income or principal and (b) the future distributees or permissible distributees if the trust were to terminate with no powers of appointment being exercised.<sup>115</sup> Second, the total value of trust property must be less than \$50,000.<sup>116</sup> Third, after considering the purpose of the trust and the nature of the trust property, the trustee must conclude that the value of the trust property is insufficient to justify the continued cost of administration.<sup>117</sup> Fourth, the trustee’s power to terminate the trust must not cause the trust assets to be included in the trustee’s estate for federal estate tax purposes.<sup>118</sup> And fifth, the trust must not involve an easement for conservation or preservation.<sup>119</sup> When the trust terminates, the trustee must distribute the property “in a manner consistent with the purposes of the trust.”<sup>120</sup>

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109. Glenn M. Karisch, *2007 Legislative Update: Summary of Changes Affecting Probate, Guardianship and Trust Law* 12 (2007), <http://www.texasprobate.com/07leg/2007update.pdf>.

110. *Id.*

111. *See id.*

112. Act of May 12, 2005, 79th Leg., R.S., ch. 148, § 2, 2005 Tex. Gen. Laws 287, *repealed by* Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 2, 2007 Tex. Gen. Laws 801, 801; Act of May 5, 1983, 68th Leg., R.S., ch. 657, § 2, 1983 Tex. Gen. Laws 3332, 3374, *repealed by* Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 8, 2007 Tex. Gen. Laws 801, 803.

113. TEX. PROP. CODE ANN. §§ 111.0035, 114.005 (Vernon Supp. 2008).

114. *See id.* § 112.059.

115. *Id.* § 112.059(a).

116. *Id.*

117. *Id.*

118. *Id.* § 112.059(c).

119. *Id.* § 112.059(d).

120. *Id.* § 112.059(b).

## D. BOND

The 2007 legislature made several important changes to the rules governing the bonding of trustees.<sup>121</sup> First, the court may no longer waive bond if the settlor did not waive bond in the trust.<sup>122</sup> Second, the court may, for cause shown, require a noncorporate trustee to post bond even if the settlor waived bond in the trust.<sup>123</sup> Third, the court may order the bond to be payable to the trust estate or the registry of the court as well as the beneficiaries.<sup>124</sup> And fourth, an interested party may bring an action to require a bond, not just to increase or decrease the amount of an existing bond.<sup>125</sup>

## E. INTERPRETATION AND CONSTRUCTION

A settlor creating a support trust must make extremely clear the standard of living that the trust is to support and whether distributions from a support trust are for the "first" or "last" dollars of support. The importance of doing so is reflected in *Keisling v. Landrum*,<sup>126</sup> a case in which a husband established a testamentary trust for his wife under which she would receive distributions only if her "own income and other financial resources from sources other than from this trust are not sufficient" to maintain her in the standing of living that they had while married. Because the trustee had made no distributions, the wife filed suit claiming that "other financial resources" referred only to income, thereby requiring the trustee to distribute trust income to her as soon as her own income could not support her standard of living. The trustee asserted that other financial resources meant assets as well as income and that the wife must exhaust all of her assets, except for one house and one vehicle, before being entitled to distributions from the trust. The trial court held in favor of the trustee and the wife appealed.<sup>127</sup>

The Fort Worth Court of Appeals reversed by agreeing with the wife that the trust did not demonstrate that her husband "intended the trust to be a parachute to protect [her] from poverty after she had exhausted all of her own assets."<sup>128</sup> Instead, the court concluded that the trust's purpose was to "step in and pay for [her] high standard of living," such as multiple homes, vehicles, cruises, gifts to others, shopping, and maid service.<sup>129</sup> The court noted that it would be "nonsensical to require [the wife] to sell all of her vehicles and other assets . . . just so the trust could 'step in' and provide her with funds to purchase new assets and vehicles

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121. See Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 6, 2007 Tex. Gen. Laws 801, 803 (current version at TEX. PROP. CODE ANN. § 113.058 (Vernon Supp. 2008)).

122. TEX. PROP. CODE ANN. § 113.058(b) (Vernon Supp. 2008).

123. *Id.* § 113.058(d).

124. *Id.* § 113.058(b)(1).

125. *Id.* § 113.058(d).

126. 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied).

127. *Id.* at 739.

128. *Id.* at 742.

129. *Id.*

to replace them.”<sup>130</sup> The court held that the husband’s will was unambiguous and then adopted the language of Restatement (Third) of Trusts that the term other financial resources refers only to “‘income and other periodic receipts, such as pension or other annuity payments and court-ordered support payments.’”<sup>131</sup>

The court recognized, however, that the trustee also “has a competing responsibility to manage the trust prudently and responsibly to preserve it for her *future* support and maintenance.”<sup>132</sup> Thus, the trustee was not required to give in to the wife’s every request but must distribute for her maintenance and support. The court explained that “[b]ecause the trust’s purpose is to provide for [her] high standard of living both now and in the future, [the trustee] is required to use his discretion in distributing funds so that the trust is not depleted rapidly and wastefully.”<sup>133</sup> The appellate court did not, however, determine the size of any distribution to the wife but instead concluded that “the trial court must now determine what [the wife’s] standard of living was then make trust distributions to compensate [her] from the date of [her husband’s] death.”<sup>134</sup>

#### F. STANDING OF CONTINGENT BENEFICIARY OF REVOCABLE TRUST

Even if the trustee and the settlor with the power to revoke are the same person, all changes to trust agreements should be in writing to avoid later disputes such as that in *Moon v. Lesikar*.<sup>135</sup> In *Moon*, a father created a trust, named himself and his son as the initial trustees, indicated that he could revoke or amend by giving written notice to the trustee, and named himself as the sole beneficiary during his life. Many transactions subsequently occurred, including a sale of trust property to his son at a price considerably below market value. His daughter (a remainder beneficiary of the trust) claimed that this sale was in breach of duty. The trial court disagreed and rendered a summary judgment in favor of the son.<sup>136</sup>

Upon the daughter’s appeal, the Fourteenth District Houston Court of Appeals affirmed by holding that the daughter had no standing to complain about the sale.<sup>137</sup> The court acknowledged that normally a beneficiary is an interested person under Texas Trust Code section 111.004(7) and thus would have standing to bring an action under Texas Trust Code section 115.001.<sup>138</sup> In this case, however, the daughter, a mere contingent beneficiary, was complaining about a transaction made by the settlor of a revocable trust.<sup>139</sup> Recognizing this as a matter of first impression in

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130. *Id.*

131. *Id.* at 743 (quoting RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(2) (2003)).

132. *Id.* at 743 (*emphasis in original*).

133. *Id.* at 744.

134. *Id.* at 745.

135. 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

136. *Id.* at 802.

137. *Id.* at 806.

138. *Id.* at 803.

139. *Id.*

Texas, the court examined cases from other jurisdictions.<sup>140</sup> This examination led the court to conclude that because the father was both the settlor and the trustee with full power to revoke the trust, the vesting of the daughter's contingent interest was subject to the father's discretion until his death.<sup>141</sup>

The daughter also claimed that her father's revocation did not comply with Texas Trust Code section 112.051(c) because it was not in writing. The court held that conveying the property out of the trust was a clear indication of her father's intent to revoke and that he was not required to give himself written notice of the revocation.<sup>142</sup> In so holding, the court explained that it would be absurd to require the father (as the settlor) to send himself (as the trustee) a letter stating that he is revoking a portion of the trust.<sup>143</sup>

### G. PROTECTION OF THIRD PARTIES DEALING WITH TRUSTEE

The 2007 legislature overhauled the provisions that protect third parties who deal with trustees by amending Texas Trust Code section 114.081. Under the amended section, a person who deals with a trustee is not liable to the trustee or the beneficiaries if the trustee exceeded the scope of the trustee's authority in dealing with the person, provided that (1) the person deals with the trustee in good faith and (2) the trust receives fair value.<sup>144</sup> Likewise, a person who acts in good faith in delivering money or other assets to a trustee is not required to ensure that the trustee properly uses the money or other assets.<sup>145</sup>

A non-beneficiary who deals with the trustee is not required to inquire into the extent of the trustee's powers or the propriety of the trustee's exercise of those powers if the person (1) deals with the trustee in good faith and (2) obtains a copy of the trust instrument or a "certification of trust."<sup>146</sup> In addition, a non-beneficiary who assists an ex-trustee or deals with an ex-trustee for value is protected from liability just as if the ex-trustee were still in office as long as the non-beneficiary acted in good faith and without knowledge that the trusteeship had ended.<sup>147</sup>

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140. *Id.* at 803-05.

141. *Id.* at 804.

142. *Id.* at 805-06.

143. *Id.* at 806.

144. TEX. PROP. CODE ANN. § 114.081(a) (Vernon Supp. 2008).

145. *Id.* § 114.081(c).

146. *Id.* § 114.081(b). When a non-beneficiary asks for a copy of the trust, the trustee now has the option of providing a "certification of trust" rather than the trust instrument. *See id.* § 114.086. This new provision enhances the privacy of the terms of inter vivos trusts.

147. *Id.* § 114.081(d).

## V. OTHER ESTATE PLANNING MATTERS

### A. MULTIPLE-PARTY ACCOUNTS

In a landmark decision, the Texas Supreme Court permitted extrinsic evidence to be used to show the depositor's intent to create survivorship rights in a multiple-party account in an action against the financial institution even though current law prohibited a claimant from establishing the survivorship feature by extrinsic evidence to claim the account funds themselves. In *A.G. Edwards & Sons, Inc. v. Beyer*,<sup>148</sup> a father and his daughter established a joint account with rights of survivorship. For tax reasons, the account was converted into a single-party account in father's name. Later, the father told the broker over the telephone that he wanted his daughter's name added back to the account. The broker prepared documents reflecting the change and delivered them to the daughter who then gave them to her father. The father signed them, and the daughter left the documents with the broker's receptionist. Later, the broker could not locate the new joint-account agreement, despite a diligent search. Before the father could sign a replacement joint-account agreement, he lapsed into a coma and died. A dispute arose over whether the balance of the funds in the account (over \$1 million) belonged to the daughter or passed to the father's six children by intestacy. The daughter settled the dispute with her siblings by agreeing to share the account equally with them.

The daughter then sued the brokerage firm for the difference between the balance in the account and the one-sixth share she received. The jury determined the firm was liable under six theories; the daughter elected to recover under the contract claim.<sup>149</sup> The firm appealed, and after the intermediate appellate court affirmed, the firm appealed to the Texas Supreme Court.<sup>150</sup>

The supreme court affirmed, rejecting the firm's argument that the trial court improperly admitted extrinsic evidence of the father's intent for the account to have the survivorship feature.<sup>151</sup> The court recognized that Texas courts consistently hold that in the absence of a written agreement described in Texas Probate Code section 439(a), extrinsic evidence is inadmissible to prove rights of survivorship against the depositor's estate.<sup>152</sup> The daughter, however, was not seeking a recovery from her father's estate or against a party to the joint account.<sup>153</sup> Instead, she was attempting to recover from the brokerage firm for losing the survivorship agreement—a loss that caused the firm to breach its contract to create a

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148. 235 S.W.3d 704, 7-6 (Tex. 2007) (respondent is not related to the author of this article).

149. *Id.* at 707.

150. *Id.*

151. *Id.* at 708, 710.

152. *Id.* at 708 (citing *Stauffer v. Henderson*, 801 S.W.2d 858, 863 (Tex. 1990)).

153. *Id.*

joint account with rights of survivorship.<sup>154</sup>

## B. SURVIVORSHIP RIGHTS IN COMMUNITY PROPERTY

Survivorship agreements involving community property must comply with Probate Code section 452 such that they must be (1) in writing, (2) signed by both spouses, and (3) contain express survivorship language.<sup>155</sup> *Beatty v. Holmes*<sup>156</sup> explains that a mere indication of the survivorship feature on a stock certificate is insufficient. In this case, a husband and his wife held community property securities with the notation "JT TEN," defined on the back of the certificates as "joint tenancy with right of survivorship and not as tenancy in common." Neither spouse signed the certificates. Although the probate court held that this was sufficient to create the survivorship feature, the appellate court reversed.<sup>157</sup>

After discussing the complex procedural background of the case, the Fourteenth District Houston Court of Appeals concluded that Texas Probate Code section 450 provided the only ground upon which the probate court could have granted a summary judgment that the securities had the survivorship feature.<sup>158</sup> The appellate court then rejected the argument that the lack of a signature requirement in section 450 indicates that the certificates had the survivorship feature.<sup>159</sup> The appellate court held that since the securities are community property, the survivorship feature must be created under Texas Probate Code section 452, which requires that both spouses sign the survivorship agreement.<sup>160</sup> Because both spouses had not signed such an agreement, the securities lacked the survivorship feature despite the language contained on the certificates.<sup>161</sup>

In reaching this decision, the court recognized that the interplay between section 452 (requiring signatures) and section 450 (requiring no signatures) had not been addressed by a Texas court.<sup>162</sup> The court explained that when section 450 was enacted in 1979, spouses could not yet hold community property in survivorship form; that legal relationship was not allowed until the passage of a constitutional amendment in 1987.<sup>163</sup> Thus, the legislature could not have intended section 450 to provide a method for spouses to create survivorship rights in community property.<sup>164</sup> Accordingly, section 450 authorizes "pay on death" type provisions, not the creation of survivorship rights in community property.

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154. *Id.*

155. TEX. PROB. CODE ANN. § 452 (Vernon 2003)

156. 233 S.W.3d 475, 494 (Tex. App.—Houston [14th Dist.] 2007, pet. filed); *see also* *Holmes v. Beatty*, 233 S.W.3d 494, 501-02 (Tex. App.—Houston [14th Dist.] 2007, pet. filed).

157. *Beatty*, 233 S.W.3d at 477.

158. *Id.* at 485.

159. *Id.* at 489-90.

160. *Id.* (citing TEX. PROB. CODE ANN. §§ 451-52 (Vernon 2003)).

161. *See id.*

162. *Id.* at 487.

163. *Id.* at 487-88.

164. *Id.* at 488.

## C. POWER OF ATTORNEY

*Armstrong v. Roberts*<sup>165</sup> teaches an important lesson to individuals preparing a power of attorney: Agents lack the authority to name pay on death payees unless such authority is expressly granted. In *Armstrong*, a father named his daughter as his agent under a non-statutory power of attorney. Using this authority, the daughter opened three pay-on-death certificates of deposit naming various individuals, including herself, as the pay-on-death payees. The El Paso Court of Appeals concluded that the daughter had the authority to open the certificates of deposit because the power of attorney granted her broad and unlimited powers, such as the power “to do . . . any and all acts . . . as [the father] might or could do if personally present.”<sup>166</sup>

However, the court held that the daughter did not have the authority to designate the pay on death payees.<sup>167</sup> The court relied on Texas Probate Code section 439(b), which states that a pay on death account requires a written agreement “signed by the original payee.”<sup>168</sup> Because the father did not sign the agreement, the daughter’s designations were ineffective.<sup>169</sup>

## D. FIDUCIARY DUTY OF ESTATE ATTORNEY

An attorney must take great care when representing parties with potential conflicts of interest, such as a personal representative and the beneficiaries. Even when the attorneys involved have the parties sign comprehensive consents, the possibility of litigation—especially by subsequent representatives of the parties—still exists, as demonstrated by *Baker Botts, L.L.P. v. Cailloux*.<sup>170</sup> In this case, a husband and his wife hired a law firm to plan their multi-million dollar estate, but the husband died before completion of this plan. On the advice of the law firm, the wife disclaimed her right to her share of the husband’s community property, thereby resulting in this property vesting in charities that the husband had designated in his will. Over six years later and after the wife had become incapacitated, her son sued the law firm for breach of fiduciary duty by claiming that the firm and a bank did not fully and fairly disclose the impact of the disclaimer. The jury found that the firm, the bank, and the attorneys had breached their fiduciary duties but that the wife had no damages.<sup>171</sup> Nonetheless, the trial court created an “equitable trust” for \$65.5 million to be funded by the firm and the bank.<sup>172</sup>

The law firm and bank appealed, and the San Antonio Court of Ap-

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165. 211 S.W.3d 867, 870 (Tex. App.—El Paso 2006, pet. denied).

166. *Id.* at 870-71.

167. *Id.*

168. *See id.* at 870-71 (citing TEX. PROB. CODE ANN. § 439(b) (Vernon 2003)).

169. *Id.* at 871.

170. 224 S.W.3d 723 (Tex. App.—San Antonio 2007, pet. denied).

171. *Id.* at 732-33.

172. *Id.* at 733.



peals reversed.<sup>173</sup> The court carefully examined the conduct of the law firm, the bank, and the individual attorneys involved. In doing so, it recognized the potential conflicts of interest between the parties (the personal representative of the husband's estate and the beneficiaries) but agreed with appellant's argument that they had adequately notified the parties of the conflicts and that the parties had consented to the joint representation.<sup>174</sup> The court discerned no evidence that any of the alleged breaches of duty caused the wife's disclaimer.<sup>175</sup>

The appellate court also held that even if the law firm and the bank had breached their duties, the trial court abused its discretion in imposing an "equitable trust."<sup>176</sup> The appellate court treated this remedy as a constructive trust and explained that the requirements of a constructive trust had not been proven.<sup>177</sup> For example, there was no evidence that the firm or the bank held legal title to any of the assets that the wife disclaimed.<sup>178</sup> In addition, this trust would have placed the wife in a better position than if the wife had not executed the disclaimer.<sup>179</sup>

#### E. VOIDABLE MARRIAGES

The 2007 legislature added Texas Probate Code section 47A to authorize a court, under certain circumstances, to deem a decedent's current marriage void for lack of mental capacity even after the decedent has died.<sup>180</sup> This section was designed to "undo" marriages entered into due to the actions of conniving and abusive caregivers.

If a family code proceeding to void a marriage based on lack of mental capacity is pending at the time of death (or if the court has been asked to do so in a pending guardianship proceeding), the court may declare the marriage void despite the death of the decedent.<sup>181</sup> In doing so, the court must apply the same standards as for an annulment under the Texas Family Code.<sup>182</sup>

If a proceeding to void a marriage based on lack of mental capacity is not pending at the time of death, the court may nonetheless deem the marriage void if all of the following conditions are met: (1) the decedent entered into the marriage within three years of the decedent's death, (2) an interested person files an application to void the marriage on the basis

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173. *Id.* at 738.

174. *Id.* 735-36.

175. *Id.*

176. *Id.* at 736.

177. *Id.* at 736-37.

178. *Id.*

179. *Id.* at 737-38.

180. Act of May 15, 2007, 80th Leg., R.S., ch. 1170, § 4.01, 2007 Tex. Gen. Laws 4000, 4003-04 (current version at TEX. PROB. CODE ANN. § 47A (Vernon Supp. 2008)) (applying not only to a decedent who dies on or after September 1, 2007, but also to decedents who died earlier if the probate or administration is pending on September 1, 2007 or is commenced on or after September 1, 2007).

181. TEX. PROB. CODE ANN. § 47A(a) (Vernon Supp. 2008).

182. *Id.*

of lack of mental capacity within one year of the decedent's death, (3) the court finds that the decedent lacked the mental capacity to consent to the marriage and understand the nature of any marriage ceremony that might have occurred, and (4) the court does not determine that after the date of the marriage, the decedent "gained the mental capacity to recognize the marriage relationship" and actually recognized the relationship.<sup>183</sup>

If the marriage is deemed void, the surviving partner of the void marriage is not considered the decedent's surviving spouse for any purpose under Texas law.<sup>184</sup> For example, the surviving partner would not be able to receive an intestate share of the estate or claim homestead rights.

#### F. MEDIATED SETTLEMENT AGREEMENT

Individuals entering into agreements to settle property matters in a divorce action should include a clear provision addressing what should happen if one or both parties dies between the date the agreement is signed and the date the divorce is finalized. The case of *Spiegel v. KLRU Endowment Fund*<sup>185</sup> is instructive on this issue. While a husband and his wife were in the process of divorcing, they entered into a mediated settlement agreement which allocated community property, accounts, life insurance, and other property. One day before the hearing to finalize the divorce, the wife died. The trial court held that the agreement was enforceable even though it was never incorporated into a valid divorce decree.<sup>186</sup>

The husband appealed, but the Austin Court of Appeals affirmed.<sup>187</sup> The court recognized this issue as one of first impression in Texas and held that the agreement was "enforceable on the plain language of the statute and the public policy underlying it, as well as the parties' intent as expressed in the language of the agreement."<sup>188</sup> In so holding, the court determined that the agreement was sufficient to revoke the beneficiary designations in the husband's favor regarding nonprobate assets in his wife's estate, such as life insurance and retirement plans.<sup>189</sup>

The appellate court rejected the husband's claim that the trial court lacked jurisdiction over nonprobate assets and that the mediated settlement agreement did not extend to beneficial interests.<sup>190</sup> Recognizing a split of authority, the court held that the better view was that the allocation of nonprobate assets to one spouse (as that spouse's separate property) acts to revoke a beneficiary designation of the asset in favor of the other spouse because individuals who are divorcing intend to revoke beneficiary designations in favor of the soon-to-be ex-spouse—unless there is

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183. *Id.* § 47A(b)-(e).

184. *Id.* § 47A(f).

185. 228 S.W.3d 237 (Tex. App.—Austin 2007, pet. denied).

186. *Id.* at 239.

187. *Id.*

188. *Id.* at 241.

189. *Id.* at 241-43.

190. *Id.* at 244.

express language to the contrary.<sup>191</sup>

#### G. UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

The 2007 legislature enacted the Uniform Prudent Management of Institutional Funds Act (UPMIFA) replacing the Uniform Management of Institutional Funds Act passed in 1989.<sup>192</sup> UPMIFA provides statutory guidelines for the management, investment, and expenditure of endowment funds held by charitable institutions.<sup>193</sup> It expressly provides for diversification of assets, pooling of assets, and total portfolio management.<sup>194</sup> This brings the law governing charitable institutions in line with modern investment and expenditure practice as done in the trust context by the Uniform Prudent Investor Act.

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191. *Id.* at 245.

192. Act May 25, 2007, 80th Leg., R.S., ch. 834, § 1, 2007 Tex. Gen. Laws 1729, 1729-36 (current version at TEX. PROP. CODE ANN. §§ 163.001-.011 (Vernon Supp. 2008)).

193. See TEX. PROP. CODE ANN. §§ 163.001-.011 (Vernon Supp. 2008).

194. See *id.* § 163.004(e)(4).